

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1960

No. 681

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES, *et al.****Appellants,*

vs.

**UNITED STATES OF AMERICA, *et al.****Appellees.*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF MICHIGAN**BRIEF FOR APPELLEE ERIE-LACKAWANNA  
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March 23, 1961

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF MICHIGAN

**BRIEF FOR APPELLEE ERIE-LACKAWANNA  
RAILROAD COMPANY**

**OPINIONS BELOW**

The order and report of the Interstate Commerce Commission (hereinafter the Commission) (R. 10) is reported at 312 I. C. C. 185. The opinion of the three-judge District Court upholding the action of the Commission (R. 196) is reported at 189 F. Supp. 942.

**STATUTE INVOLVED**

The statute involved is Section 5(2)(f) of the Interstate Commerce Act (hereinafter the Act) enacted as part of the Transportation Act of 1940 (54 Stat. 905, 49 U. S. C. § 5(2)(f)):

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

### QUESTION PRESENTED

The question presented is:

Whether the second sentence of § 5(2)(f) requires the Commission to impose as a minimum condition to its approval of all railroad mergers a "job freeze", by which all employees of the merging railroads must be retained in the same or equivalent jobs for a period equal in time to their prior service, not to exceed four years, with the result that jobs cannot be abolished during that period except by attrition.

That is the only question raised by appellants before the Commission and in the court below. No question is raised or presented as to whether the Commission has discretion to impose a job freeze or abused its discretion in refusing to impose a job freeze in its approval of this merger.\*

### STATEMENT OF THE CASE

This case represents the first challenge by railway labor to a unique body of compensatory protection for railroad employees affected by railroad combination. That protection has been developed by Congress, by the Commission, by railway management and by railway labor itself over the

\*Appellants' position does not admit of any discretion in the Commission. Throughout these proceedings appellants' claim has been that, as a matter of law, the second sentence of § 5(2)(f) lays down a rigid minimum requirement that a job freeze be imposed in all railroad mergers (and other transactions subject to Section 5 of the Act), and that the statutory command is not satisfied by any other form of protection, such as compensatory conditions. That was the issue presented to the examiner (R. 186-188), the Commission (R. 196, 19, 26), and the court below (R. 170, 181, 198). And that is the issue tendered to this Court by appellants' brief (see, e.g., Question 4 at p. 3, and p. 33).

This broad claim of appellants for a mandatory rule, applicable to all transactions under Section 5 of the Act, must accordingly be considered in the light of its impact on railroad consolidations generally, under all conceivable circumstances, and not solely in the light of the facts of this or any other particular case. Appellants concede as much (Br. 20-21) and frankly admit that their extreme position is prompted by the number of railroad mergers presently pending and contemplated (Br. 5-6, 11-12).

It is therefore neither necessary nor appropriate for this Court to consider or decide whether the Commission may, under certain circumstances, have discretion or power to impose a job freeze under § 5(2)(f). Since such a question is neither raised nor presented here, it can and should be left for determination to such time as it may be properly presented in the first instance to the Commission. *United States v. Western Pac. R. R.*, 352 U. S. 59, 62-65; *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U. S. 411, 416-422.

The first four questions presented by appellants (Br. 2-4) are but variants of the question as stated above. Their fifth question (Br. 4) is without substance for the reasons stated *infra* pp. 58-59.

past twenty-five years. Beginning with the Washington Agreement of 1936 (R. 139-151), between railway labor and management, railway workers displaced (that is, moved to different locations and/or to lower paying jobs) or furloughed (that is, dismissed from active employment) as a result of mergers, coordinations and other combinations of facilities have enjoyed substantial and unusual monetary protection against the effect of reorganization unknown to the general labor force of this nation. Congress adopted that policy in Section 5(2)(f) of the Transportation Act of 1940. The development of that system of benefits, culminating in its latest expression in the New Orleans Conditions (R. 152-159), has been a history of steady expansion of protection, regardless of the financial condition of the railroads bearing the economic burden thereof. Thus for twenty-five years, as a result of collective bargaining agreements and Congressional policy, railway labor has occupied a sheltered enclave in the national economy.

Rejecting the principle of compensatory benefits, appellants now claim, for the first time, that employees may not be displaced or dismissed by reason of rail mergers—that the second sentence of § 5(2)(f) requires the Commission to impose as a minimum, in every merger or similar transaction,\* provisions for a job freeze under which affected employees will somehow be maintained in their same, or equivalent, or comparable jobs at comparable pay, for a period of up to four years. This sudden concern and change of position is prompted, appellants allege, by the large number of railroad mergers pending and anticipated,\*\* which appellants fear will aggravate the continuing contraction of the railway labor force. Railway labor's response to this

\*Section 5(2) of the Act deals with consolidations, mergers and similar railroad unification arrangements, all of which it refers to as "transactions". The term "merger" is generally used in this brief as meaning the "transactions" covered by § 5(2).

\*\*A development which Congress has consistently encouraged, under proper conditions, since 1920. See discussion, *infra* at pp. 42-48.

problem is to insist upon a policy of complete preservation, in every situation, of jobs, whether needed or not, by the merging railroads.

This sweeping claim comes before this Court in the following context:

Facing virtual financial collapse as separate organizations, the Erie Railroad Company (hereinafter Erie) and The Delaware, Lackawanna and Western Railroad Company (hereinafter Lackawanna) entered into a merger agreement, dated June 24, 1959, in the hope of effecting by such merger sufficient economies and improvements in service to permit continued operation.\* On July 6, 1959, they filed a Joint Application with the Commission for permission, pursuant to Section 5 of the Act, to consummate the proposed merger. *Erie Railroad Company—Merger, Etc.—Delaware, Lackawanna & Western Railroad Company, Finance Docket No. 20707*. In that Joint Application, Erie and Lackawanna stated (p. 37), “[t]he Applicants consent to the entry of an order by the Commission for the protection of employees in conformity with the order in *New Orleans Union Passenger Terminal Case*, 282 I. C. C. 271 (1952).” The conditions prescribed in that case, commonly known as the “New Orleans Conditions”, afford affected employees broad compensatory protection in the event of displacement or discharge.\*\* Neither those condi-

\*R. 26; White Affidavit, printed as Appendix C (p. 34a) to our Memorandum of February 3, 1961, responding to the Jurisdictional Statement.

\*\*The New Orleans Conditions (R. 152-159), among other things, insure against loss of income during the protected period. Thus, if an employee is displaced to a lower paying job, he is paid the difference in pay. If he is dismissed, he continues to receive his same pay until he obtains other employment, in which event if the new job pays less, he continues to receive the difference. The conditions also make provision for continuance of fringe benefits such as pensions, hospitalization, et cetera (R. 157). If an employee is required to change his residence, his moving expenses are paid and he is protected against loss on the sale of his house (R. 158-159).

tions nor any conditions ever imposed by the Commission require a job freeze.

Between September 29 and October 22, 1959, hearings were held before an Examiner on the Joint Application. Appellant Railway Labor Executives' Association (hereinafter RLEA), intervened at the outset, in behalf of appellant Brotherhood of Maintenance of Way Employees (hereinafter Brotherhood) and other railroad brotherhoods, and was represented throughout those hearings. RLEA introduced no evidence at those hearings and never suggested that the conditions proposed by the applicants would not meet the statutory standard. Nor did RLEA suggest, by evidence or argument, that any different conditions should be approved. Indeed, throughout the proceedings before the Commission RLEA never suggested that the New Orleans Conditions were inadequate as compensatory conditions, if compensatory conditions were all that § 5(2)(f) required, and RLEA actually proposed the incorporation of those Conditions in its freeze proposal. (R. 188-190)

It was not until after the record had been closed that RLEA, in its brief filed with the Examiner,\* argued for the first time that neither the New Orleans Conditions nor any other merely compensatory conditions would satisfy the requirements of § 5(2)(f) (R. 170). RLEA admitted in its brief that for almost 20 years, ever since § 5(2)(f) was added to the Act in 1940, it and railway labor in general had agreed that compensatory conditions met the requirements of the Act. Nevertheless, RLEA asserted that § 5(2)(f) requires, as a *minimum*, that all employees affected by a proposed merger must be given complete preservation of employment. As justification for its new position, RLEA stated that the large number of impending

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\*The record in Finance Docket No. 20707 was closed on October 22, 1959. RLEA filed its brief on November 23, 1959.

railroad mergers required a re-examination of the *minimum* legal requirements of § 5(2)(f). With its brief RLEA submitted conditions which, in its view, would satisfy that minimum statutory requirement. Those conditions (R. 188-190) provide in substance for a job freeze *plus* any additional monetary benefits that the New Orleans Conditions might afford.\*

Since RLEA did not raise its novel job freeze claim until after the record had been closed, the record before the Commission and before this Court does not, as the Commission noted (R. 20),\*\* show what the impact of that freeze would be on the merged carrier, Erie-Lackawanna Railroad Company (hereinafter Erie-Lackawanna).

The Examiner's Recommended Report and Order of March 30, 1960, recommended approval of the merger and imposition of the New Orleans Conditions for the protection of affected employees (R. 183-188). RLEA filed exceptions, challenging the Examiner's recommendation and again asserting its unique and unsupported position that § 5(2)(f) requires job preservation. RLEA argued its position before the entire Commission on July 20, 1960. Thereafter, on September 15, 1960, the Commission served its Report and Order approving the proposed merger as recommended. (R. 10)

\*The conditions submitted require "complete preservation of employment for four years" for "all employees adversely affected by the merger", regardless of the employee's period of prior service (R. 190). Appellants have since abandoned the claim for four year protection for all employees since the statute clearly limits the period of protection to the length of prior service, if less than four years.

\*\*The record does contain a report, submitted by the railroads, prepared by Wyer, Dick and Company in 1958 estimating the cost of complying with the New Orleans Conditions on the basis of the employment figures for 1956. Appellants attempt to use certain figures in that report (R. 112) to suggest that their job freeze contention would not work a hardship on the Erie-Lackawanna. (Br. 7, 25). For the reasons stated *infra*, p. 45 such use of those figures is inappropriate.

In its unanimous Report the Commission discussed RLEA's legal argument at length (R. 17-26). It found from a review of the Act, its legislative history and the relevant precedents that "the association's [RLEA's] newly asserted position that the act requires us to maintain railway employees in their jobs is incorrect and untenable". Further, the Commission stated (R. 26):

"Assuming that we have power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

As stated on page 3, *supra*, no question of the Commission's power or discretion is involved, since the issue is whether § 5(2)(f) *requires* the Commission to impose a job freeze in all mergers as a *minimum*.

On October 7, 1960, the Brotherhood brought this action in the District Court for the Eastern District of Michigan to enjoin and set aside the Commission's Order. RLEA and Erie-Lackawanna intervened. After a preliminary hearing on October 12, Judge Thomas P. Thornton, by order entered October 14, 1960 (R. 160-162), permitted the consummation of the merger on October 17, but stayed any action by the merged road adversely affecting employees.

The case was thereafter fully briefed and argued on November 15, 1960. By opinion dated December 7 the three-judge court unanimously rejected appellants' claim (R. 196). Appellants' efforts to stay the impact of that opinion resulted in two additional hearings on December 8

and December 19, when the court below entered its order dismissing the action and denying any stay (R. 204). The appeal to this Court and renewal of the stay followed (R. 211).

### SUMMARY OF ARGUMENT

Appellants claim that the second sentence of § 5(2)(f) is no longer satisfied by compensatory conditions, but now requires a job freeze as a minimum in all rail mergers. Appellants would thereby erase 20 years of history which they have significantly helped to shape. Included in that history are: (a) railway labor's interpretation of § 5(2)(f) when enacted in 1940 as providing financial benefits; (b) the Commission's contemporaneous and continued construction of the statute as requiring compensatory conditions; (c) railway labor's active acceptance of that construction and its cooperation with the Commission and railway management in the development of appropriate compensatory conditions; (d) the absence of any claim that a job freeze was required until that contention was raised in this proceeding. It is accordingly understandable why appellants thus far have not been able to persuade anyone that their newly asserted position is correct. Their job freeze claim has been rejected without qualification or dissent by the Examiner, by the full Commission and by the three judges of the statutory court below. It should likewise be rejected by this Court.

1. Section 5(2)(f) is couched in such general language as to be hardly susceptible of an interpretation requiring any specific condition, much less a mandatory job freeze. The section does not state that employees are to be maintained in their jobs, that jobs cannot be abolished or that there is to be a job freeze. Instead, the critical

second sentence of § 5(2)(f) simply provides in general language that the Commission shall include in its order approving a merger "terms and conditions" providing that for a period of up to four years the merger will not result in affected employees "being in a worse position with respect to their employment". Appellants would read that phrase as if it provided that employees are to be maintained in their employment by the merged carrier. But the statute uses the comparative "with respect to" and does not tie the word "employment" to "present employment". The statute thus can appropriately be construed, as the Commission has done, to provide simply that compensatory protection must be given so that "the employee's position as it relates to his livelihood is unharmed by the transaction".

Appellants' construction ignores the fact that the statute deals with "affected" employees, which this Court has read in its ordinary sense of "adversely affected". *Railway Labor Executives' Association v. United States*, 339 U. S. 142, 155. Under appellants' job freeze thesis, there would be no "adversely affected" employees during the protective period of the second sentence of § 5(2)(f).

Appellants' "plain meaning" contention also founders on the fact that when Congress has deemed an employment freeze justified, it has provided therefor in explicit and self operating terms which contrast sharply with the general language of § 5(2)(f) and the provision therein for the Commission to include terms and conditions. See the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, which was special legislation in effect for only three years, and Section 222(f) of the Communications Act (47 U. S. C. 222(f)), passed in 1943 virtually as a private bill for the merger of the Postal Telegraph Company into Western Union. Significantly, it was explained to Congress in connection with that 1943 legislation why the difference

in the telegraph and railroad industries required Congress to do more for telegraph employees in 1943 than it did for railroad labor in § 5(2)(f) in 1940 (89 Cong. Rec. 1195-1196).

2. The legislative history of § 5(2)(f) does not compel appellants' job freeze construction. Instead it supports the Commission's compensatory construction.

Appellants are faced with the impossible task of demonstrating that the language of the rejected Harrington Amendment, which provided

"That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees",

means exactly the same thing as the second sentence of § 5(2)(f) requiring the Commission to include "terms and conditions" providing that the transaction will not result in employees *affected* "being in a worse position with respect to their employment". Such a demonstration, however nimbly and extensively articulated, flies in the face of reality, particularly since appellants' previous position has long been to the contrary.

In considering the legislative history of the second sentence of § 5(2)(f), the important fact is not what the proponents and the supporters of the Harrington Amendment thought that amendment meant or what they stated concerning the modification made by the Wadsworth motion to recommit. The important fact is that the second sentence, in the form enacted, was written in conference as a substitute for the modification of the Wadsworth motion. It was explained by its authors, the conferees, in terms stating that it would not delay mergers and showing that it contemplated the dismissal and displacement of em-

ployees. In that event such employees would be given protection in the form of monetary benefits to make them financially whole during the protected period. See the Conference Report at 86 Cong. Rec. 10167, and the explanations of House Managers Lea, Halleck and Wolverton at 86 Cong. Rec. 10178, 10187 and 10189. Those explanations were not challenged nor was any claim raised that the second sentence of § 5(2)(f) required a job freeze, instead of compensatory benefits, during the course of the consideration and adoption of the Conference Report in the House and in the Senate.

3. The Commission, contemporaneously with the enactment of § 5(2)(f) in 1940, and continuously since, has construed § 5(2)(f) as requiring only compensatory conditions. The Commission has *never* imposed the job freeze which appellants now belatedly urge that the second sentence of § 5(2)(f) inflexibly requires in all rail mergers. Promptly in 1941, the Commission advised Congress of its practice of requiring compensatory benefits for displaced and dismissed employees and Congress has never questioned that practice. The Commission's construction is reasonable under the terms of § 5(2)(f) and its legislative history. Moreover, the Commission's construction is confirmed by the understanding of § 5(2)(f) expressed in publications of railway labor (*infra*, pp. 39-40) at the time of its enactment and has had labor's support in many cases involving large numbers of employees until the present challenge. This history completely refutes appellants' contention that the plain meaning and the legislative history of § 5(2)(f) alike require preservation of jobs. Under these circumstances, the Commission's construction is entitled to great weight and should be upheld. *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549; *F. T. C. v. Mandel Bros.*, 359 U. S. 385, 391.

4. Appellants' job freeze thesis conflicts with the Congressional policy of fostering an efficient and financially sound railway system and must be rejected since it is not compelled by any of the relevant guides to the construction of § 5(2)(f)—its language, its legislative history and its contemporaneous and continued administrative construction.

Beginning with the Transportation Act of 1920, Congress has placed continuing emphasis upon railroad mergers as an appropriate means of accomplishing its declared policy of promoting economical and efficient service and fostering sound economic conditions in transportation. A primary aim of that policy is "the avoidance of waste", *Texas v. United States*, 292 U. S. 522, 530, and the legislation must be read with that policy in mind. *Seaboard R. R. v. Daniel*, 333 U. S. 118, 124-125. Further, as stated in *County of Marin v. United States*, 356 U. S. 412, 416-417, the Congressional purpose is "to facilitate merger and consolidation in the national transportation system."

By preserving unneeded jobs, appellants' job freeze contention poses an obstacle to railroad mergers and must be rejected as in conflict with Congressional policy. As the Commission said (R. 26):

"Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

Since appellants are arguing for a rule of general application, the important consideration here is that their job freeze construction can be an obstacle to rail mergers. It is enough that appellants admit that the full benefits of a

merger may be postponed to a "limited extent" (Br. 25). Appellants try to minimize this obstacle by suggesting that attrition will swiftly eliminate surplus employees (Br. 25). But, attrition is not the easy solution which appellants suggest. Because of the human variables involved,—death, retirement, resignation—attrition simply does not operate uniformly and constantly and in all employee classifications so that jobs are created in the right places and at the right times. The experience of Erie-Lackawanna indicates that attrition is only a partial solution. Also, during the necessary interval before attrition begins to work, there will be a period of harassing uncertainty. It is virtually impossible to understand how appellants' variously described job freeze principle would operate in practice.

Under the present restraint Erie-Lackawanna, though technically merged, is in effect still operating two railroads with costly and wasteful duplication of operation and facilities. Once that restraint is lifted, the merger can be made effective in a prompt and orderly fashion; under the well-defined procedures of the New Orleans Conditions, unneeded facilities can be closed, operations can be consolidated; employees can be transferred, and unneeded employees can be dismissed. In sharp contrast, the amorphous nature of appellants' job preservation claim raises a host of questions in vital areas such as whether unneeded facilities can be closed, the extent to which operations can be consolidated, the duties, if any, which are to be assigned to employees whose services are not needed, and where those surplus employees are to perform their duties or non-duties, as the case may be. With problems like these, the benefits of the merger will inevitably be postponed.

5. The decisions of this Court in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, and *Order of Railroad Telegraphers v. Chicago & North West-*

*ern Ry.*, 362 U. S. 330, do not support appellants' job freeze construction. To the contrary, *RLEA* refutes appellants' contention, and *Telegraphers* was not concerned with the requirements of § 5(2)(f). In *RLEA*, the question involved was whether "compensatory protection" for employees "displaced" by a section 5(2) transaction could be extended beyond the four-year period prescribed by the second sentence of § 5(2)(f). The "plain meaning" and "compelling" history of that section were not apparent to the RLEA in 1950, for the Association did not once suggest there that a job freeze was the minimum protection required under the second sentence of § 5(2)(f). Indeed, it acknowledged at p. 55 of its brief that compensatory conditions satisfied the minimum requirements of that sentence. This Court agreed with that construction, and noted with approval that under the Commission's order employees displaced within the four-year period "may receive compensatory protection", 339 U. S. at 154, and further confirmed its understanding that compensatory protection satisfies the command of § 5(2)(f) in its discussion of other Commission proceedings, 339 U. S. at 154-155.

Nor can appellants derive support from *Telegraphers*. The issue in that case was whether a railroad had a statutory duty to bargain concerning a union's demand for a job freeze. In dissent, four members of this Court stated that Congress in § 5(2)(f) "eliminated any power to freeze existing jobs." 362 U. S. 332, 357. Appellants argue that the majority must have taken an opposite view, but this is dispelled by the opinion of the Court which found it necessary to go no farther than to note that § 5(2)(f) recognized that "stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system . . .", 362 U. S. at 337, and that no policy elsewhere expressed in or inferred from the

Act made illegal a demand to bargain for a job freeze. *Telegraphers*, then, neither expressly nor impliedly decided that the second sentence of § 5(2)(f) required a job freeze.

6. No question of the adequacy of the New Orleans Conditions is before the Court, since their adequacy was not challenged before the Commission. *United States v. Western Pac. R. R.*, 352 U. S. 59, 62-65; *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U. S. 411, 416-422. However, the complaints which appellants make on brief about the New Orleans Conditions being only partially compensatory are so insubstantial that it is appropriate to eliminate them as a point of contention by the undertakings made herein by Erie-Lackawanna consistent with those previously given in connection with the applications to this Court for a stay (see pp. 56-57 *infra*).

7. The court below did not err in referring to labor publications or in its handling of testimony taken in the hearing on the temporary restraining order. Appellants' claim to the contrary is captious. The court below did not refuse to accept the testimony, but left the matter undecided, and appellants took no exception (R. 176-180). Similarly, appellants did not object to the references in brief and in argument to the labor publications which were mentioned by the court in footnote 3 of its opinion (R. 201). More important, the court below was not required to shut its eyes to matter of this kind, which was relevant to the issue before it. *Cf. Brown v. Board of Education*, 347 U. S. 483 at 494, n. 11.

## ARGUMENT

1. Section 5(2)(f) is couched in general language and is not susceptible of an interpretation requiring any specific condition; plainly it does not require a job freeze.

Appellants' claim that the plain language of § 5(2)(f) commands a job freeze is untenable. As pointed out *infra*, pp. 37-42, the Commission has for 20 years construed § 5(2)(f) as requiring only compensatory benefits. Also, railway labor contemporaneously interpreted the section the same way and has acquiesced in the Commission construction until the present challenge. Considering that history, one can only wonder where the "plain meaning" requiring a mandatory job freeze has lain hidden from 1940 to 1959.\*

The obvious answer is that the language of § 5(2)(f) is not susceptible of the interpretation which appellants would fasten on it. It does not in terms state that employees are to be maintained in their jobs, that jobs cannot be abolished or that there is to be a job freeze. The second sentence of the section, which is the critical portion on which appellants rely, provides in pertinent part simply:

"In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, . . ."

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\*In particular, appellants' "plain meaning" argument is inconsistent with the position taken by RLEA on brief in *Railway Labor Executives' Association v. United States*, 339 U. S. 142—see pp. 50-51, *infra*.

The court below found no ambiguity in the structure of § 5(2)(f). It stated (R. 199):

"From our reading of 5 (2)(f) we are unable to find a clear expression, as plaintiffs contend, that continued employment of affected employees is required to be imposed. We believe that ordinary everyday logical reading of 5 (2)(f) mitigates against plaintiffs' contention. The phrase here in issue, 'in a worse position with respect to their employment' is couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition, much less that of guaranteed employment."

That conclusion is clearly correct.

As noted by the court below, appellants' claim to the contrary rests solely on the meaning they would distill from the phrase "being in a worse position with respect to their employment". Appellants seek to read that phrase as requiring that employees be maintained *in* their same or equivalent employment *by the merged carrier*. There are two obstacles to such an interpretation of that phrase. In the first place, the statute does not use the word "*in*"—it uses the comparative "with respect to". Secondly, the statute does not tie the word "employment" to employment with the merged railroad. This use of the comparative and general reference to "employment" makes it appropriate to construe the statute, as the Commission did here (R. 20), as meaning simply that the purpose is to "make certain that the employee's position as it relates to his livelihood is unharmed by the transaction". The statute is thus satisfied by protecting the employee against financial loss on account of dismissal or displacement.

There are other reasons for rejecting the construction which appellants would impose upon the second sentence of § 5(2)(f). A principal reason is that it ignores the statutory requirement that an employee be "affected". Both the

first and second sentences of § 5(2)(f) refer not to employees generally but to those who are "affected" by the merger. It is those employees—the ones who are displaced or dismissed by reason of the merger—who are to be protected. This Court\* held in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, 155, that the second sentence of § 5(2)(f) is "a minimum protection for employees adversely affected". Under appellants' construction there will be no "affected" employees during the protective period, for all employees will be retained in their jobs.

This consideration also answers, we submit, appellants' objection that the compensatory New Orleans Conditions do not satisfy the second sentence of § 5(2)(f) because those conditions do not operate until employees have been placed in a "worse position with respect to their employment" by being dismissed or displaced (Br. pp. 2-3). That contention falls, when the word "affected" is read, as this Court has read it, in its normal sense of "adversely affected", because the second sentence of § 5(2)(f) necessarily contemplates that an employee is to be protected when he is "adversely affected".\*

Also, contrary to appellants' assertion, the imposition of protection against financial loss does not have the effect of substituting the word "compensation" for the word "employment" in the phrase "being in a worse position with respect to their employment". The New Orleans Conditions protect affected employees against losses in matters which are comprehended within the broader term "employment", but which might lie outside the term "compensation". Thus, the New Orleans Conditions protect employees' pension, hospitalization and similar fringe benefits

\*RLEA asked for protection for "all employees adversely affected by the merger" in the proposed conditions it submitted to the Examiner (R. 190).

(R. 157). They also provide reimbursement of moving expenses and protect against loss in the sale of homes (R. 157-159).<sup>\*</sup> When every word in the phrase upon which appellants rely is considered, it is clear that employees are *not* "in a worse position with respect to their employment" when they are receiving equal compensation and fringe benefits even though they are not working.

But the greatest objection to construing the general language of § 5(2)(f) as imposing a job freeze is the fact that when Congress intends such a freeze it uses explicit and self operating terms. Congress did so briefly in the railroad industry, prior to enactment of § 5(2)(f), and subsequently in the telegraph industry. It is instructive to note the differences between the language used in those two statutes and that in § 5(2)(f). The Emergency Railroad Transportation Act of 1933, 48 Stat. 211, which expired on June 17, 1936, flatly provided in section 7(b) that "the number of railroad employees shall not be reduced" as a result of action taken under the Act,

"nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title."

Congress similarly imposed a job freeze in 1943 in connection with mergers of common carriers by telegraph or radio in section 222(f) of the Communications Act (47 U. S. C. § 222(f)), which provides in part as follows:

"(f)(1) Each employee of any carrier which is a party to a consolidation or merger pursuant to this section who was employed by such carrier immediately preceding the approval of such consoli-

<sup>\*</sup>The adequacy of the New Orleans Conditions is discussed *infra*, pp. 53-57.

dation or merger, and whose period of employment began on or before March 1, 1941, shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years from the date of the approval of such consolidation or merger, and during such period no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry."

Those provisions for a job freeze in precise and self operating terms contrast vividly with the general provision of § 5(2)(f) requiring the Commission to "include terms and conditions" so that the merger will not place affected employees "in a worse position with respect to their employment". If a job freeze was intended, why is it left to the Commission to impose "terms and conditions"—why is not the freeze self operating, as in the case of each of the two statutes cited?

But more important than the obvious differences in language and effect is the fact that Congress expressly recognized in 1943 that it was providing greater protection in § 222(f) than it had only three years before in § 5(2)(f).<sup>\*</sup> Thus Senator McFarland, a co-sponsor of § 222(f), stated (88 Cong. Rec. 3415):

"We personally felt that one of the most important provisions in the bill should be the protection of employees. We have, therefore, gone further in this bill to protect the man who has become trained in the telegraph profession from losing his position and seniority than any legislation ever enacted by Congress. . . ."

<sup>\*</sup>Section 222(f) was originally introduced in the 77th Congress (1942) and it was reintroduced and passed in the 78th Congress (1943), 57 Stat. 5.

Senator White, another proponent, agreed (88 Cong. Rec. 3416):

"Mr. President, I agree with the Senator from Arizona that if written into law or made effective as a condition of consolidation these provisions would afford labor security and, advantages obtained through no other legislation upon the statute books."

The same thought was echoed in the 1942 report of the Senate Committee on Interstate Commerce (S. Rep. No. 1490, 77th Cong., 2d Sess., p. 10):

"The committee believes that it has recommended in this legislation the greatest degree of labor-protection requirements yet produced in any legislation . . .".

Senator White later pointed out why the difference between the railroad and telegraph merger situations required going further to protect telegraph labor (89 Cong. Rec. 1195-1196):

"Something has been said about what we have done for railroad labor, and the question is asked why we should do more for the telegraph employees than has been done for railroad employees. I think there is a very basic difference which furnishes a convincing reason for the greater liberality on our part for the telegraph company labor. When a railroad line is abandoned or when its services are curtailed employees affected can go to a hundred other railroads in the country seeking employment. When a corresponding change occurs with reference to a telegraph company, when the Postal Telegraph Co. disappears, there is just one place where the man who has given his life's services to the telegraph industry can go for employment, and that is to the merged company which it is proposed to set up. Because of that narrow market for telegraph labor

I think we are justified in what I concede is liberality."\*

When Congress believes a job freeze is necessary it imposes one in clear, specific and self-operating terms. Congress did not do so in the general language of § 5(2)(f) and such a construction cannot be read into it. When all is said and done, the language of § 5(2)(f) is barren of any requirement of a job freeze or any other specific "term" or "condition" governing the exact nature of the protective "terms and conditions" which the Commission is required to impose to protect employees affected by railroad mergers. Under the terms of § 5(2)(f) the Commission was free to impose the compensatory New Orleans Conditions.

**2. The legislative history of § 5(2)(f) supports the Commission's holding that the statute requires only the payment of financial benefits to discharged or displaced employees. It certainly does not compel the conclusion that Congress intended to impose a job freeze.**

**a. Introduction.**

With respect to the legislative history of the critical second sentence of § 5(2)(f), appellants are faced with the impossible task of demonstrating that the language of the rejected Harrington Amendment, which provided "that no such transaction shall be approved by the Commission if

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\*Appellants cannot avoid the force of these authoritative explanations by relying on a statement read by Senator Taft for Senator Hawks in opposition to § 222(f)—see Br. 69-70. As appellants properly caution (Br. 68), "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is to the sponsors that we look when the meaning of the statutory words is in doubt." *Mastro Plastics Corp. v. N. L. R. B.*, 350 U. S. 270, 288, n. 22.

such transaction will result in unemployment or displacement of employees of a carrier or carriers, or the impairment of existing employment rights of said employees", means exactly the same thing as the phrase in the second sentence of § 5(2)(f) that no affected employees shall be "in a worse position with respect to their employment". Such a demonstration, however nimbly and extensively articulated, flies in the face of reality and common sense, particularly since appellants' previous position has long been to the contrary.\*

As is often the case with important legislation, the legislative history of the labor protection provisions which evolved as § 5(2)(f) is not a model of clarity. But when attention is focused on the way in which the exact language of § 5(2)(f), and particularly the critical second sentence thereof, was arrived at and explained, these conclusions are appropriate:

(1) The second sentence of § 5(2)(f) was ~~a~~ substitute for a modification of the Harrington Amendment, differing in language and in meaning.

(2) The second sentence of § 5(2)(f) was authoritatively explained to Congress in terms recognizing that employees could be displaced or dismissed during the protective period and that the payment of compensatory benefits would satisfy the statute.

(3) The legislative history accordingly does not "compel" the conclusion that § 5(2)(f) was intended to impose a job or employment freeze. Instead, it sup-

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\*The "compelling" legislative history argument of appellants, like their "plain meaning" argument, is undermined by the position taken by RLEA on brief in *Railway Labor Executives' Association v. United States*, 339 U. S. 142—see pp. 50-51, *infra*.

ports the Commission's practice of requiring compensatory benefits.

The bases for these conclusions follow.

**b. The legislative background and the protective provisions initially submitted to Congress.**

The merger provisions of the Transportation Act of 1920 (41 Stat. 456) did not specify any labor protective conditions. In 1933, Congress enacted the Emergency Railroad Transportation Act of 1933 (48 Stat. 211) with the job freeze provision which has been discussed *supra*, pp. 20-23. One of the main purposes of that Act was the promotion of mergers and consolidations in the ailing railroad industry to remove unnecessary duplications of service and facilities. The 1933 Act did not, however, accomplish that purpose and was allowed to lapse on June 17, 1936, one month after railway management and railway labor had established in the Washington Agreement (R. 139-151) a pattern of *compensatory* provisions to alleviate the adverse effects of mergers and the like upon railway labor.

The railroads' continued financial difficulties prompted the President to appoint in September, 1938 a "Committee of Six", the membership of which was equally divided between management and labor, to consider transportation problems and to recommend legislation. The Committee of Six recommended to Congress, among other things, that in the new consolidations section of the Act there be authority to require "a fair and equitable arrangement to protect the interest of the . . . employees".\* That language was understood by Congress as assuring to employees affected

\*The Committee's recommendation is printed in Hearings Before The Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 2531 (Omnibus Transportation Bill), 76th Cong., 1st Sess. 275 (1939) (hereinafter referred to as House Hearings).

by railroad mergers the compensatory protection of the Washington Agreement.\*

With that understanding and in accordance with the recommendation of the Committee of Six and the testimony of RLEA Chairman Harrison, the bill, S. 2009, which became the Transportation Act of 1940 was introduced and

\*George M. Harrison, then Chairman of RLEA (and a member of the Committee of Six), appeared before the House Committee to discuss the Washington Agreement and to make recommendations concerning labor protective provisions to be written into the proposed Transportation Act. Mr. Harrison submitted a copy of the Washington Agreement and summarized its terms as follows (House Hearings 241):

"Any employee who is continued in service but is affected by a coordination [e.g., a merger or consolidation] is guaranteed for a period not exceeding 5 years thereafter that he will be in no worse position with respect to compensation and working conditions.

"Any employee who is deprived of employment as a result of a coordination is entitled to receive 60 percent of his average monthly compensation for varying periods of time based upon length of service with the employer . . ." (Emphasis added.)

Moreover, Mr. Harrison urged a continuation of compensatory conditions, as follows (*id.* at 243):

"THE CHAIRMAN. You indicated yesterday that you thought that legislation should be enacted covering this subject.

"MR. HARRISON. Yes, sir.

"THE CHAIRMAN. That agreement [the Washington Agreement], of course, is still in effect.

"MR. HARRISON. That is true.

"THE CHAIRMAN. Has it been satisfactorily maintained?

"MR. HARRISON. Generally speaking, Mr. Chairman, the agreement has been satisfactory.

"So, I would not be here urging that you attempt to do anything different than what we are in agreement with our employers on.

"Now just how you would cover that in the law is a matter that I would want to give some thought to. . . ."

Mr. Harrison testified to the same effect before the Senate Committee on Interstate Commerce. See Hearings before the Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869 and S. 2009, 76th Cong., 1st Sess., 34 and 38.

passed by the Senate on May 25, 1939 (84 Cong. Rec. 6158), with the provision which is now the first sentence of § 5(2)(f), directing the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected".

**c. The Harrington Amendment.**

When S. 2009 came to the House, its Committee on Interstate and Foreign Commerce substituted its own bill under the Senate number but continued the requirement for "a fair and equitable arrangement" for affected employees. Because of the feared vagueness of that provision, and at the behest of the Brotherhood of Railroad Trainmen, Representative Harrington of Iowa proposed the following amendment from the floor (84 Cong. Rec. 9882):

"Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."

That amendment, which appeared to impose a job freeze, and which was completely inconsistent with the preceding provision of the bill requiring a fair and equitable arrangement to protect the "employees affected", was adopted by the House in the bill as passed on July 26, 1939 (84 Cong. Rec. 9887). The bill then went to conference to resolve the differences between the houses.

Strenuous objections were raised to the inclusion of the Harrington Amendment on the ground that a mandatory job freeze would conflict with the basic purposes of the bill. Particularly vigorous in its opposition was the Commission, which argued as follows in a letter and report of

January 29, 1940, from Chairman Eastman to the Chairmen of the House and Senate committees:

"As for the [Harrington] proviso, the object of unifications is to save expense, usually by saving labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement' of 1936 between the railroad managements and labor organizations. The [Harrington] proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees." I. C. C. Report of Jan. 29, 1940, p. 67

**d. The rejection of the Harrington Amendment; the Wadsworth motion to recommit.**

The conferees were unable to agree upon the Harrington Amendment and avoided the problems it raised by striking the provisions which would have amended the merger provisions of section 5 of the Act.\* Thus, the bill as reported out of conference on April 26, 1940, contained no labor protective provisions. The conferees also eliminated two other amendments which had been adopted by the House.

When the Conference Report came before the House, Representative Wadsworth moved to recommit the bill to conference with instructions concerning the three rejected House amendments. As to the rejection of the Harrington Amendment, the motion gave the following instructions to the House Managers (86 Cong. Rec. 5886):

"3. That the managers on the part of the House insist on the inclusion in the report of the committee of conference the provisions adopted by the House relating to combinations and consolidations of carriers (secs. 8 and 22 of the House amendment) but

\*See the Conference Report, H. R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61, reprinted at 86 Cong. Rec. 5854.

modified so that the sentence in section 8 which contains the provision known as the Harrington amendment, read as follows:

“(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment.

“Notwithstanding any other provision of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.”

It is essential to consider the precise language of the Wadsworth proposal because it clearly demonstrates the error in appellants' contention (Br. 50-51) that the bill was recommended with instructions that the *Harrington Amendment* be insisted upon. A reading of the Wadsworth proposal makes it clear that appellants' equation of the Harrington Amendment with the Wadsworth proposal (which equation is crucial to their position) is erroneous. The Wadsworth recommendation to the House Managers was to insist on the inclusion of the provisions previously adopted by the House “but modified so that the sentence in section 8 which con-

tains the provision known as the Harrington amendment reads as follows", and then contains language completely different from the Harrington Amendment. The only resemblance between the two was that neither contained any time limitation. There is no serious question that the legislation proposed in the Wadsworth motion was not the Harrington Amendment.\*

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\*Appellants lay great stress on the statements of Mr. Harrington and other supporters of the Wadsworth motion as showing that the motion was the same in substance as the original Harrington Amendment. But the radical difference in language suggests that those statements, instead of being intended to be taken at face value, may have been designed for the record, to satisfy constituents in that election year. Even Mr. Harrington in speaking about the Wadsworth proposal referred to the "modified language for labor protection" (86 Cong. Rec. 5869) and later described it simply as "designed to accomplish the purposes intended to be accomplished by the Harrington amendment." (86 Cong. Rec. 5871). Moreover, Representative Wolverton, one of the House Managers, clearly expressed his understanding that the Wadsworth proposal was not the equivalent of the Harrington Amendment (86 Cong. Rec. 5880):

"The fact that the former proponents of the Harrington amendment have now abandoned it and now ask the House to adopt another and different kind in its place, as set forth in the proposed Wadsworth motion to recommit, certainly makes clear a lack of confidence in the former amendment and further justifies the action taken by the conferees in removing the whole controversial subject from the bill and leaving it for further study by the board which is to be set up to study the transportation problem."

He repeated the same idea immediately prior to the vote on the Wadsworth motion to recommit in the following colloquy (86 Cong. Rec. 5885):

"Mr. WOLVERTON of New Jersey. Will the gentleman make clear that the motion to recommit which it has been suggested will be made by the gentleman from New York (Mr. Wadsworth) does not contain the Harrington amendment?"

"Mr. BULWINKLE. I did not know that. I thought it would contain the Harrington amendment."

"Mr. WOLVERTON of New Jersey. It is an entirely different amendment. It seems as if the Harrington amendment proponents have made an additional suggestion."

The House adopted the motion to recommit and the bill went to a second conference with the Wadsworth modification (86 Cong. Rec. 5886).

#### **e. The Second Conference.**

The second conference produced § 5(2)(f) in its present form, including the critical second sentence. Accordingly, it is to the Conference Report and the explanation given by the conferees that resort must be had to understand what was intended, for they were the authors of the final language, not Mr. Harrington or the supporters of the Wadsworth motion to recommit, as appellants seem to think. Two crucial facts emerge:

1. The second sentence of § 5(2)(f) as adopted by the second conference was not the Harrington Amendment, nor even the change thereof made by the Wadsworth motion. It was a substitute and was described as such in the Conference Report and in the explanation given by the House Managers and by Senator Wheeler who, as Chairman of the Senate Committee on Interstate Commerce, was in charge in the Senate. Thus the Conference Report stated (H. R. Rep. No. 2832; 76th Cong., 3d Sess., p. 69, reprinted in 86 Cong. Rec. 10167):

"The House amendment included a proviso (the Harrington amendment) prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights. There was no similar provision in the Senate bill. In lieu of this proviso, the following provision has been included in the conference substitute: [there follows a quotation of the language of § 5(2)(f) as passed]"

Representative Lea, who as Chairman of the House Committee on Interstate and Foreign Commerce was the

principal Manager on the part of the House, described § 5(2)(f) as adopted by the conference as "The substitute that we bring in here" (86 Cong. Rec. 10178). Similarly, Senator Wheeler twice explained to the Senate that the second conference was reporting "out the bill with substitutes for the Jones and Harrington amendments" (86 Cong. Rec. 11270, 11766) and further that the conference "agreed to a compromise on the Harrington amendment" (86 Cong. Rec. 11625). Indeed, because of these "compromises" Representative Wadsworth, the author of the House motion to recommit with instructions, raised a point of order against the second Conference Report for failure to follow the instructions of the House (86 Cong. Rec. 10174). The reality of Mr. Wadsworth's complaint is readily apparent from comparison of the second sentence in his motion with the second sentence of § 5(2)(f) as adopted by the conference and enacted. Not only was protection limited to a maximum of four years. There was also added the requirement that the employees be "affected".

2. The second crucial fact is that § 5(2)(f) was explained to Congress in terms which showed it could be satisfied by the payment of financial benefits to persons dismissed or displaced during the protective period. Thus, the second Conference Report gave this explanation (86 Cong. Rec. 10167):

"In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement the benefits to employees will be required to be paid for not longer than 4 years after the consolidation,

and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation."

The words "benefits to employees will be required to be paid" certainly imports an intention to require compensatory benefits.

That explanation was elaborated and confirmed by Representative Lea, the principal House Manager. He stated that "employees have protection against *unemployment* for 4 years, but the Commission is not required to give them *benefits* for any longer period." (86 Cong. Rec. 10178, emphasis added). Then he gave unequivocal answers to questions from the House floor raising the very issue involved in this case (*ibid.*):

"Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean if a consolidation were made there would still be a 4-year period during which the man would be paid?"

"Mr. LEA. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.

"Mr. VORYS of Ohio. That would be whether or not they were still employed?"

"Mr. LEA. Yes."

"Mr. O'CONNOR. Mr. Speaker, will the gentlemen yield?"

"Mr. LEA. I yield to the gentleman from Montana."

"Mr. O'CONNOR. As I want to see those who might lose their jobs as a result of consolidation protected, I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to his

employment. Does 'worse position' as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?

"Mr. LEA. I take that to be the correct interpretation of those words. . . ."

The second sentence of § 5(2)(f) was thus authoritatively explained as not delaying consolidation and as requiring continuance for the protected period of the same compensation to employees who lose their jobs as a result of consolidation.\*

Mr. Lea's explanation was confirmed by the other House Managers\*\* who discussed the scope of § 5(2)(f) in the course of the House consideration of the second Conference Report, for they also used language to the effect that compensatory benefits satisfied the statutory command.

\*This requirement of full compensation for dismissed employees disposes of appellants' argument that, since the first sentence of § 5(2)(f) authorizes compensatory protection, something more than compensation is intended under the second sentence. As previously shown, the first sentence contemplated imposition of the Washington Agreement which provided for only 60% compensation to dismissed employees—pp. 25-27 *supra*. In the light of the explanation given by Mr. Lea it is more reasonable to read the second sentence of § 5(2)(f) as intended to give more definite and greater compensatory protection—i.e., full compensation up to a maximum of four years.

\*\*The House Managers were Representatives Lea, Crosser, Bulwinkle, Cole, Wolverton, Holmes and Halleck. Only Representatives Lea, Wolverton and Halleck explained § 5(2)(f) in detail. However, Representative Crosser made the following general statement showing his understanding that the conference substitute differed from the Harrington Amendment (86 Cong. Rec. 10192):

"I do not hesitate a moment in saying that the revised provision contained in the present conference report is more advantageous to railroad workers than was the amendment of the gentleman from Iowa [Mr. Harrington]. . . ."

It is interesting to compare this statement with the Commission's report, *supra*, p. 28, that the Harrington Amendment "in the long run will do more harm than good to the employees."

Representative Halleck explained that § 5(2)(f) followed the principle of the Washington Agreement, which of course provided only compensatory benefits for dismissed or displaced employees (86 Cong. Rec. 10187):

"As to the Harrington amendment, I do not know what the author of that amendment is going to do about this bill, but I do know and understand that the people whose cause he so valiantly championed are not objecting to this provision as it is now written. It follows the principle of the so-called Washington agreement that was a contract entered into by the carriers with their employees to fix the rights of employees whose employment terminated upon consolidation. This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, writes it into law."

Representative Wolverton, the third House Manager who spoke to the point, also stated in his explanation of the conference compromise that financial assistance was intended (86 Cong. Rec. 10189):

"The conferees have struggled long and hard to agree upon language that would be mutually satisfactory to all the Senate conferees, the brotherhoods, and the railroads. We believe the language now proposed as a compromise is a fair and just solution. We also understand that it is acceptable to all who are to be affected by the provision. I sincerely hope that it will have the approval of the House as I do not believe anything further can be done if this fails to be acceptable. If this should fail then I am fearful that it would not be possible to obtain any legislation on the subject. I do not believe that any one who is truly interested in the welfare of the employees, or in helping the plight of the distressed railroad industry would want such a result. Nor should anyone overlook the fact that the adoption of this amendment

as agreed to by the conferees gives railroad workers protection against sudden dismissal and financial assistance that is not enjoyed by workers in any other industry. ...."

These explanations in terms of "benefits to be paid", whether or not persons were still employed, and financial assistance, cannot be brushed aside, as appellants seek to do. (Br. 78-80), as informal or uninformed statements by opponents of the legislation. They constitute the considered explanation given by the conferees, who were the authors of the language in the conference compromise and responsible for the bill.

Significantly, during the consideration of the second Conference Report in both houses, no one challenged the explanation of the second Conference Report as requiring financial benefits or the above described statements of the House Managers. There was no assertion that § 5(2)(f) imposed a job freeze. See generally the proceedings on the second Conference Report in the House (86 Cong. Rec. 10146-10194) and in the Senate (86 Cong. Rec. 11269-11294, 11537-11547, 11610-11631, 11634-11639, 11758-11769).\*

The legislative history of § 5(2)(f) thus simply does not compel the conclusion that the second sentence as enacted is the same as the original Harrington Amendment and imposed a job freeze, limited however to four years. Instead, the proper conclusion is that the second sentence is intended to provide a system of compensatory benefits for employees dismissed or displaced because of railroad mergers. And, if anything more could be needed to show \*

\*We agree with appellants that, given their interpretation of the legislative history of § 5(2)(f), it is ironic that Mr. Harrington voted against the second Conference Report. However, contrary to the implication in appellants' brief (n. 71, p. 68), Mr. Harrington did not state during consideration of the Report why he voted against it.

that a job freeze was not imposed by § 5(2)(f), it is furnished by the contrast drawn three years later, in 1943, between the railroad and telegraph situation in connection with the job freeze imposed in § 222(f) of the Communications Act—see pp. 20-23, *supra*.

**3. Appellants' job freeze contention must be rejected because of the Commission's contemporaneous and continuing construction of § 5(2)(f), as requiring only compensatory conditions, an interpretation moreover in which appellants have heretofore joined.**

From the foregoing analysis of the plain meaning and legislative history of § 5(2)(f), it is evident that the Commission's understanding of the section as requiring compensatory benefits is entirely correct. The Commission has so construed the section from the time of its enactment in 1940 to the present. The Commission has *never* imposed the job freeze which appellants now belatedly urge as the inflexible statutory requirement for all mergers.

The Commission first imposed compensatory conditions in two cases in 1941. *Cleveland & Pittsburgh Railroad Company Purchase*, 244 I. C. C. 793, 796, (1941) and *Texas & P. Ry. Co. Operations*, 247 I. C. C. 285, 294-295 (1941). Promptly thereafter the Commission advised Congress in its 55th Annual Report in 1941 that its practice was to impose compensatory conditions under § 5(2)(f) for displaced and discharged employees (p. 61):

"Briefly, the conditions require that during the protective period provided in paragraph 2(f) of the act, a displaced employee—that is, one who is retained in service by the applicants but placed in a worse position with respect to his compensation and the rules governing his working conditions—should

be paid a displacement allowance; that any employee deprived of employment should be paid a dismissal allowance; and that no employee should be deprived of benefits other than wages attached to his previous employment, such as free transportation, hospitalization, et cetera. . . ."

Since then the Commission has continued to impose only compensatory conditions in § 5(2)(f) cases involving hundreds and hundreds of employees.\* Significantly, as the court below noted (R. 202), Congress "has not seen fit to indicate by any attempted clarification of the Act its disagreement with the construction uniformly placed upon it in the intervening years."

The consistent position heretofore taken by railway labor further reinforces the correctness of the Commission's practice of imposing compensatory conditions under § 5(2)(f). Like the Commission, railway labor in its official publications contemporaneously construed § 5(2)(f) as requiring compensatory conditions, not a job freeze. Those publications are cited in footnote 3 of the opinion

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\*See, for example, *Louisville & N. R. Co. Merger*, 295 I. C. C. 457 (1957), where the merger contemplated abolishment of approximately 550 jobs and the transfer of an additional 289 people.

Other illustrative cases in which the Commission imposed only compensatory conditions include: *Chicago M. St. P. & P. R. Co. Trustees Construction*, 252 I. C. C. 49, 252 I. C. C. 287 (1942); *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177, 197-201 (1944); *New Orleans Passenger Terminal*, 267 I. C. C. 763 (1948), *aff'd sub. nom., Railway Labor Executives Ass'n v. United States*, 84 F. Supp. 178 (D. D. C. 1949), *rev'd on other grounds*, 339 U. S. 142, *on remand*, 282 I. C. C. 271 (1952); *International-Great Northern Railroad Company Trustee Trackage Rights*, 275 I. C. C. 27 (1949); *St. Louis Southwestern Railway Company of Texas-Lease*, 290 I. C. C. 205 (1953); *Louisiana and Arkansas Railway Company Abandonment, etc.*, 290 I. C. C. 434 (1954); *Wellsville, Addison & Galetton Railroad Corporation Purchase and Control*, 295 I. C. C. 115 (1955); *Norfolk & Western Railway Company and the Virginian Railway Company*, I. C. C. Finance Docket No. 20599 (1959).

below (R. 201), and include the October, 1940, issue of the *Journal* of the appellant Brotherhood. Of particular interest here is the interpretation stated in that *Journal* of § 5(2)(f) as requiring four years' pay for employees who lose their jobs because of a merger:\*

"Another important bill has already become law. It is the Wheeler-Lea Transportation Act, containing two main provisions:

\* \* \*

#### "FOUR YEARS' FULL PAY"

"2. The law provides that any employee who has been in the service of a railroad four years or more, and loses his job because of a merger or 'coordination', must be paid his full wages for four years. If he has been a railroad employee less than four years, he must be paid his full wages for a period as long as his previous service.

"No such protection and compensation have ever been guaranteed by law to the employees of any other industry, and the railroad workers secured these un-

\*Volume XLIX, Brotherhood of Maintenance of Way Employees *Journal*, October, 1940, at pages 13, 14. Appellants' contention (Br. 83, 85) that the District Court should not have considered those publications and their citation of *United States v. United Mine Workers of America*, 330 U. S. 258, 281-282, for that contention is simply incomprehensible. The contemporaneous understanding of the meaning of legislation expressed by those most directly affected by it is certainly relevant to the question of construction and nothing in *Mine Workers* holds to the contrary. See *infra*, pp. 58-59.

Appellants cannot escape the impact of such contemporaneous interpretations by attempting to shrug them off as the expressions of "a small minority of the railroad brotherhoods, and at that, brotherhoods which had *opposed* the Harrington amendment . . ." (Br. 18, 83), particularly when one of them is the appellant brotherhood in this case. As previously stated, the Harrington Amendment was prompted by the Brotherhood of Railroad Trainmen. It alone among the rail unions opposed the report of the Committee of Six and urged Congress to prevent mergers and consequent reduction in rail employment. Just before the vote was taken on the Harrington Amendment in the House, it was pointed out that the remaining 20 railway brotherhoods favored the bill without the Harrington Amendment (84 Cong. Rec. 9887).

precedented benefits through the Brotherhood of Maintenance of Way Employees, in a cooperative movement with the other Standard Railroad Labor Organizations."

Also highly persuasive is the course followed by RLEA. Until the present challenge, RLEA not only acquiesced in the Commission's practice but also actively agreed to compensatory protection for the workers it represents in scores of § 5(2)(f) proceedings, including six recent ones involving the Erie and the Lackawanna.\* Also, in 1950, as more fully discussed *infra* pp. 50-51, RLEA stated to this Court in its brief at p. 55 in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, that the minimum requirements of the second sentence of § 5(2)(f) were satisfied by compensatory conditions.

In short, from 1940 to 1959 we have a history of railway labor (1) supporting the Commission's practice of prescribing compensatory conditions, (2) negotiating with

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- \* (1) Finance Docket No. 19989      Involving the coordination of facilities of Erie and Lackawanna between Binghamton, New York, and Gibson, New York, a distance of 75.76 miles, on August 31, 1959, and affecting some fifty employees.
  - (2) Finance Docket No. 19118      Involving the discontinuance of Lackawanna's 34.9-mile Ithaca Branch in 1956.
  - (3) Finance Docket No. 20075      Involving the abandonment of Lackawanna's Hampton branch in 1958.
  - (4) Finance Docket No. 20008      Involving coordination of the facilities of the Erie and Lackawanna in Paterson, New Jersey, the Commission's decision being dated February 15, 1960.
  - (5) Finance Docket No. 21169      An application filed June 17, 1960, involving the discontinuance of Lackawanna's 18.31-mile Cincinnati branch, hearing on which was held November 15, 1960.
  - (6) Finance Docket No. 19182      Involving the Hoboken coordination of facilities between Erie and Lackawanna effective October 13, 1956, and March 25, 1957, which affected 273 employees.

railway management in the articulation and development of those conditions and variations thereof (such as the Burlington Conditions, the Oklahoma Conditions and the New Orleans Conditions), and (3) construing and applying these conditions in individual cases through the so-called Section 13 Committee.\* This history completely refutes appellants' contentions as to the "plain meaning" and "compelling" legislative history of the statute. The second sentence of § 5(2)(f) is not a chameleon; it does not prescribe compensation in 1940 and 1950 and suddenly in 1959 require preservation of employment as a minimum condition. The present number of mergers pending or contemplated does not change the meaning of § 5(2)(f)—it remains the same whether the employees involved are hundreds or thousands.

Indeed, § 5(2)(f) is part of a comprehensive statute designed to encourage mergers. See *infra*, pp. 42-48. In the light of the past history of railway labor's attitude toward the second sentence of § 5(2)(f), appellants' explanation of the reason for the change in position as to the minimum command of that sentence is wholly unconvincing. If they are correct in their new assertion that the minimum requirement is the preservation of jobs, not compensation, they have given away the *minimum* rights of labor in case after case in the past. We submit that appellants' newly asserted position stands exposed for what it is—an attempt to get the job freeze which Congress rejected in 1940. Appellant's thus pose a question of policy for the Congress, not a matter of construction for the courts.

The Commission's interpretation of § 5(2)(f) as requiring only compensatory benefits, being reasonable, contemporaneous and long continued, and having been supported

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\*This joint committee of representatives of management and labor to review disputes as to the application of compensatory conditions was established pursuant to Section 13 of the Washington Agreement (R. 150).

by railway labor until the present challenge, is entitled to great weight and should be upheld. *United States v. American Trucking Ass'ns.*, 310 U. S. 534, 549; *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678, 681-682; *Boutell v. Walling*, 327 U. S. 463, 469-471; *FTC v. Mandel Brothers*, 359 U. S. 385, 391.\*

**4. Appellants' job freeze contention conflicts with the Congressional policy of fostering an efficient and financially sound railroad system.**

Although the foregoing analysis completely disposes of appellants' contention for a job freeze construction, there is yet another reason which compels rejection of that novel claim. The preservation of unneeded jobs raises what may well be an insuperable obstacle to railroad mergers,\* and thus conflicts with Congress' encouragement of rail mergers as an appropriate means of achieving its declared policy of promoting economical and efficient service and fostering sound economic conditions in transportation.\*\*

\*Indeed, RLEA has publicly announced its opposition to all mergers. See *New York Times*, Dec. 26, 1960 (P. 26, Col. 6, Late City Ed.); *Wall Street Journal*, Dec. 27, 1960 (P. 2, Col. 3, Final Ed.); *Traffic World*, March 18, 1961 (P. 27, Col. 3).

\*\*The National Transportation Policy, adopted as part of the Transportation Act of 1940 reads as follows (49 U. S. C. preceding section 1):

"It is hereby declared to be the national transportation policy of the Congress \* \* \* to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; \* \* \* and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

and further provides that

"All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

This Court is familiar with the recurrent financial difficulties of the railroads and the policy of Congress to keep them in a sound financial condition.

Thus, as this Court said in commenting on the changes made by the Transportation Act of 1920 (41 Stat. 456), "It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public." *Texas v. United States*, 292 U. S. 522, 530. Similarly, in *Seaboard R. R. v. Daniel*, 333 U. S. 118, 124-125, it was said, "Congress has long made the maintenance and development of an economical and efficient transportation system a matter of primary national concern. Its legislation must be read with this purpose in mind."

The Court is also familiar with the fact that over the years, as the railroad industry has experienced periodic financial crises, Congress has placed a continuing emphasis on appropriate mergers as a means of maintaining a sound railroad industry in the public interest. The first enunciation of that policy was in the Transportation Act of 1920 (41 Stat. 456), which was adopted in the light of the financial difficulties experienced during World War I. Under that Act the Commission was directed to prepare a plan for the consolidation of the railroads into a limited number of systems. Such an approach did not prove feasible. Accordingly, and in view of the plight of the industry during the depression when about one-third of the railroad mileage (including Erie) was in bankruptcy or receivership, Congress, by the Transportation Act of 1940, amended section 5 of the Act to its present form. Under that Act the form and initiation of mergers is left to the railroads subject to the approval of the Commission on several conditions, including § 5(2)(f). As this Court has stated, the "congressional purpose in the sweeping revision" thus made in section 5 "was to facilitate merger and consolidation in the

national transportation system." *County of Marin v. United States*, 356 U. S. 412, 416-417.\*

Appellants do not, and cannot, claim that their job freeze thesis will facilitate mergers. In fact, they admit that under their view "the full benefits of the merger may be partially and temporarily postponed" until such time as natural attrition eliminates surplus jobs (Br. 25; R. 71). Of course, neither merger nor economical transportation is encouraged by a job freeze principle which, for a period of up to four years, may require keeping unnecessary people in unnecessary jobs with attendant confusion and safety problems and inevitable erosion of morale and work standards. It was for those reasons, among others, that the Commission rejected appellants' contention, saying (R. 26):

"Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

And the court below, in upholding the Commission, stated (R. 202-203):

"... A requirement that carriers retain employees following mergers would sterilize provisions of the

\*The failure of the railroad industry to avail itself fully of the merger authority enacted in 1940 came under Congressional criticism in connection with the Transportation Act of 1958, 72 Stat. 568, which, among other things, authorized the Commission to guarantee loans to railroads in an aggregate amount not to exceed \$500 million. The report of the Senate Committee on Interstate Commerce on the bill which became that Act states:

"The railroad industry has not, in the subcommittee's opinion, been sufficiently interested in self-help in such matters as consolidations and mergers of railroads; \* \* \*"

S. Rep. No. 1647, 85th Cong., 2d Sess., p. 11 (1958).

Act which is designed to promote economy partially through the reduction of personnel."

The important consideration here is that under appellants' job freeze construction an obstacle to rail mergers can exist—that as appellants admit, under their claim, "the full benefits of the merger may be partially and temporarily postponed". The question here is not whether the obstacle exists in every situation, or how great or slight it may be in a particular case, or what the precise effect may be on Erie-Lackawanna. That is so because appellants are seeking a rule of general application—the preservation of all jobs, as a matter of law, for up to four years as a *minimum* condition in all rail mergers.

Appellants try to minimize this obstacle by suggesting that under their claim the benefits of the merger will be postponed only to a "limited extent" because surplus employees "will be absorbed and swiftly eliminated by natural attrition" (Br. 25).<sup>\*</sup> In truth the effect on Erie-Lackawanna will be serious for two reasons.

First, attrition is not the happy solution appellants imply it to be. This is readily apparent from the nature of attrition itself. Employees simply do not die, retire, resign or get fired in such a uniform and constant way that openings are automatically and continuously created in the right

<sup>\*</sup>Appellants refer in this connection to estimates in the Wyer report (R. 112) as to jobs to be abolished and jobs which would be created by attrition during the first five years following the merger. Conditions have changed so radically since that report was prepared that the estimates in it can no longer be relied upon as indicating how the merger will affect employees. Those estimates were based upon the 1956 employment level of 28,000 and the average attrition for 1954, 1955 and 1956. Since then the number of employees has declined over 25%, to a level of 20,318 in February, 1961, for reasons extraneous to the merger such as automation, declines in revenue and traffic, and the current economic situation, all of which has to be considered in determining what effect the merger will have on employees.

places and at the right times for persons whose particular skills would otherwise be surplus. Because of the human variables involved, attrition simply does not "fit" to solve the problem of creating openings for unneeded employees, except over some appreciable period of time. In addition, agreements with the unions significantly inhibit labor mobility through craft boundaries and seniority divisions.

The experience of Erie-Lackawanna indicates that attrition is no more than a partial solution even over the maximum four year period of the second sentence of § 5(2) (f). Thus, in its Hoboken coordination, under which 273 employees received the benefit of the New Orleans Conditions, there were still 16 employees at the end of the four year period, in three different classifications, for whom attrition had not made comparable jobs available. Also, based on experience, it is estimated that, in the case of 128 line clerk positions which Erie-Lackawanna currently plans to eliminate, attrition will create openings for only 84 over the four years, leaving a surplus of 44 at the end of that period if the positions must be maintained. See the affidavit of Garret C. White, Vice President-Operations of Erie-Lackawanna, printed as Appendix A.

It may well be that attrition will work more satisfactorily and rapidly in some other classifications and that it could ever conceivably solve the problem in a few. To the extent that attrition works, however, it works as well under the New Orleans Conditions as under a job freeze. As suitable openings are created, employees drawing compensatory benefits will be called back in order of their seniority. This is not only plain economics; it is also required by collective bargaining agreements.

The second, and more serious, consequence to Erie-Lackawanna of a job freeze is the inability to plan during the time that it inevitably takes for attrition to work. Under the present restraint, Erie-Lackawanna, although techni-

cally merged, is in effect operating two railroads, with two sets of employees and costly duplication of operations and physical facilities.\* The planning and implementation of the merger of Erie-Lackawanna is a complex and difficult matter at best. However, once freed of the present restraint, Erie-Lackawanna will be able to proceed promptly with orderly implementation of the merger under the New Orleans Conditions. In accordance with the well defined procedures which have been developed to assure financial protection under those Conditions, unneeded facilities can be closed, operations can be consolidated, employees can be transferred, and unneeded employees can be dismissed.

In contrast with the well established procedures under the New Orleans Conditions, there are no guides to implementation of appellants' job freeze. A host of questions arises from the variety of ways in which their contention has been expressed—*e.g.*, "complete preservation of employment" (R. 190)—"freeze the employment situation" (R. 181)—"equivalent employment" (Br. 3)—"comparable work" (Br. 11)—"a continued active employment status substantially comparable" to that held prior to merger (Br. 14)—work may be transferred but employees must be allowed "to follow that work" (Br. 25).

For example, can unneeded facilities be closed and operations consolidated? If a station is no longer needed, must Erie-Lackawanna nevertheless keep it open so that the station clerk may be "maintained" in his employment there, or can the station be closed, with the clerk staying at home and being continued technically in an active employment status? Or can the clerk be moved to another station where he is not needed? Must employees who are not needed by the railroad be given something to do? Must useless work be

\*See the White affidavit printed as Appendix C. at pp. 36a-37a, of our Memorandum of February 3, 1961, responding to the Jurisdictional Statement.

created? Or is the available work to be divided and, if so, what effect will that have on the established work rules which define what duties an employee is expected to perform in how many hours in any given work day? (The struggle in the railroad industry over such rules is well known.) What is a comparable job—does it include a better job?

Other questions suggest themselves, but enough has been said to indicate the dimension of the problem. Planning would be difficult and implementation uncertain and piecemeal while attrition works its haphazard way. The benefits of the merger would be postponed and Erie-Lackawanna would probably become a public charge either through Federally guaranteed loans or bankruptcy.\*

The job freeze for which appellants contend as a minimum condition in all transactions under § 5(2) of the Act necessarily and admittedly postpones the full benefits of the merger until such time as attrition catches up with ensuing delay and practical difficulties of the sort suggested above. It must be rejected as inconsistent with the Congressional policy of facilitating rail mergers in the public interest.

**5. Prior decisions of this Court do not support appellants' job freeze construction; to the extent they are relevant, they support the Commission's construction.**

Appellants argue (Br. 70-75) that their job freeze construction of the second sentence of § 5(2)(f) was explicitly recognized by this Court in two cases—*Railway Labor Executives' Association v. United States*, 339 U. S. 142, and *Order of Railroad Telegraphers et al. v. Chicago and North Western Ry.*, 362 U. S. 330. They try to

\*See the White affidavit at pp. 37a-39a of our memorandum of February 3, 1961, responding to the jurisdictional statement.

support that thesis by isolated bits of language in those opinions. However, the opinion of the court in *RLEA* refutes appellants' construction; and the question of what § 5(2)(f) requires was not reached by the Court in *Telegraphers*.

*RLEA* arose out of the Commission order, dated May 17, 1948, authorizing the construction of the New Orleans passenger terminal and related railroad lines, and the abandonment of certain others. No abandonment of existing facilities was to be effected, however, until the authorized construction had been completed, which was to be by December 31, 1954. Thus it was clear that the majority of employees "adversely affected" by the transaction would not be so affected within four years after the Commission order.

In that order, the Commission, under § 5(2)(f), had imposed terms and conditions designed to protect employees for four years from the date of its order. The nature of those terms and conditions is clear. They were *compensatory*. 339 U. S. at 144. It was thus in terms of "compensatory protection" for "displaced" employees that the question was presented whether § 5(2)(f) gave the Commission

"the power to *extend* the period of protection of the interests of the railroad employees beyond four years from the effective date of the order." 339 U. S. at 143. (Emphasis added.)

The Court held that the Commission did have such power, concluding that the 4-year period specified in the second sentence of § 5(2)(f) applied to that sentence only and consequently did not place a time limit on the protection which the first sentence of the section enjoined the Commission to impose.

The significance of *RLEA* is not to be found in the Court's study of legislative history undertaken to discover

whether the 4-year limitation in the second sentence of § 5(2)(f) was intended to apply to the first sentence as well. Rather, this case is important now because the subject of the controversy was the extent of "compensatory protection" for railroad employees "displaced" by a section 5(2) transaction. 339 U. S. at 144. The "plain meaning" and "compelling" legislative history which appellants now argue require a job freeze were less than plain and compelling in 1950.

Thus in its Brief to this Court in *RLEA v. United States*, RLEA stated:

"As will become clear upon examination of the legislative history, *infra*, Congress sought to give railroad employees legislative assurance that in the event of job dismissals and displacements due to coordination transactions, they would receive protection in the form of compensatory allowances in order that they might economically adjust themselves. This was the only type of protection which the Commission had afforded under its discretionary powers prior to the enactment of Section 5(2)(f), and it was the protection which Congress sought to continue by making it mandatory." Brief for the RLEA pp. 19-20, No. 337, October Term, 1949, *Railway Labor Executives' Association v. United States*, 339 U. S. 142.

RLEA may seek to explain away this previous position by pointing out that at page 12 of the same brief it called attention to the fact that the first two sentences of § 5(2)(f) had different origins and purposes and that the second sentence "provides specific protection both of type and extent . . . . The specific type of protection is that the employee shall not be in a 'worse position' with respect to his employment . . . .". However, nowhere in that brief did RLEA ever suggest that the second sentence required the preservation of jobs as a minimum condition to the

approval of all transactions under section 5(2) of the Act. Indeed RLEA admitted at page 55 of that brief that "the minimum requirements of the second sentence of the section" are satisfied by compensatory conditions, a position which is completely inconsistent with its assertion here that the second sentence of § 5(2)(f) now requires a job freeze as a minimum condition.

More important, however, the Court agreed with appellants' 1950 compensation construction of the requirements of § 5(2)(f). Thus, it noted with approval that

"employees displaced through the early elimination of grade crossings or otherwise may receive compensatory protection up to [4 years after the effective date of the Commission's order]. . . ." 339 U. S. at 154.

Moreover, the Court further confirmed its understanding that compensatory protection satisfied the command of § 5(2)(f) in its discussion of other Commission proceedings. 339 U. S. at 154-155. While it declined to follow the precedents established by those proceedings (339 U. S. at 154, n. 17), the Court did not in any way criticize them. Rather, it found them irrelevant because in them

"the Commission did not eliminate all compensatory protection as it has for many employees here." 339 U. S. at 155.

Thus, if a job freeze is indeed required as a minimum by the second sentence of § 5(2)(f), neither the parties nor the Court found that meaning "plain" or "compelled" by the legislative history in 1950.\*

Nor can appellants derive support from *Telegraphers*. The primary issue in that case was whether a railroad had

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\*RLEA adhered to its position in its Reply to Petition for Rehearing at p. 3: "The basic purpose of Section 5(2)(f) undeniably was to give railroad workers dismissed and displaced as a result of carrier consolidation . . . a measure of protection through compensatory benefits. . . ."

a statutory duty to bargain concerning a union's demands that a job freeze be written into their collective bargaining agreement. The Court held that the railroad was so obligated.

Appellants seek support from *Telegraphers* by seizing upon a statement in the dissent of Mr. Justice Whitaker (joined by Mr. Justice Frankfurter, Mr. Justice Clark and Mr. Justice Stewart):

"Of the Harrington proviso this Court said in the *Railway Labor Executives Ass'n v. United States*, 339 U. S. 142; that it 'threatened to prevent all consolidations to which it related [but Congress] . . . made it workable by putting a time limit upon its otherwise prohibitory effect' . . . But Congress actually did more. It eliminated any power to freeze existing jobs." (362 U. S. 332 at 356-7).

Appellants reason that since the dissent took the position that Congress eliminated the power to freeze jobs, the majority must necessarily have taken a position diametrically opposed. Not only is appellants' logic faulty, but a reading of the majority opinion clearly shows that the Court did not in fact take such a position. Rather, the Court found it necessary to go no farther than to note that § 5(2)(f) recognized that

"stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system", 362 U. S. at 337,

and that no policy elsewhere expressed in or inferred from the Act made illegal a demand to bargain for a job freeze. We submit that the Court did not in terms or by necessary implication decide that the second sentence of § 5(2)(f) required preservation of jobs as a minimum condition to the approval of mergers under § 5(2) of the Act.

In summary, then, the prior decisions of this Court confirm the Commission's consistent interpretation of the statute.

6. **The adequacy of the New Orleans Conditions is not in issue. In any event, they are adequate, and any possible question in that regard is eliminated by the undertakings given herein by Erie-Lackawanna.**

Although appellants make no separate point of the matter, they indicate from time to time that the New Orleans Conditions provide only partial compensation in that they do not protect against the loss of annuity rights under the Railroad Retirement Act or provide for reimbursement of moving expenses if an employee is required to move more than once by virtue of the merger (see, *e.g.*, Br. 8, 21, 23-24). Complaint is also made that those conditions do not protect against loss of seniority rights, "bumping", and permanent loss of employment in the railroad industry (Br. 10, 21-24).

However, no attack was made on the adequacy of the New Orleans Conditions in those or any other respects in the proceedings before the Commission. The whole thrust of RLEA's position was that § 5(2)(f) required the preservation of jobs as a minimum, and could not be satisfied by any system of compensatory benefits alone. Instead of attacking the New Orleans Conditions as compensatorily inadequate, RLEA proposed including them in the job freeze provision it urged (R. 188-190). Since the adequacy of the New Orleans Conditions was thus not in issue before the Commission, it is not before this Court. *United States v. Western Pac. R. R.*, 352 U. S. 59, 62-65; *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U. S. 411, 416-422. However, we do not stand on this proposition alone. In its order of approval the Commission retained jurisdiction for the purpose "of making such further order or orders herein as hereafter may be necessary or appropriate" (R. 32), and conceivably further resort might be had to the Commission if a serious question of adequacy exists. Because of its financial situation Erie-Lackawanna

is anxious to proceed with the merger and to avoid unnecessary delay. Accordingly, we proceed to discuss appellants' complaints about the New Orleans Conditions; we submit that they are so insubstantial that it is appropriate to eliminate them as a point of contention by the undertakings which Erie-Lackawanna gives as hereinafter stated.

Two of appellants' complaints are wrong:

(1) The New Orleans Conditions do not cause loss of seniority rights or "bumping". The creation and retention of seniority rights is governed by the terms of collective bargaining agreements. Under the collective bargaining agreements which Erie-Lackawanna has, with one minor exception, employees retain their seniority rights even though laid off. That is true, for example, under the agreements with appellant Brotherhood which were introduced at the hearing on the temporary restraining order below (R. 118, 126, 130-131, 135-136). Bumping is the result of the union seniority system and exists whether compensatory conditions or a job freeze is imposed for the protection of employees. Even in the case of a job freeze, there will be "bumping upward" as jobs become available through the process of attrition. Appellants' fear of repeated moves by employees as the result of bumping is overstated in the extreme. Orderly implementation of the merger under the New Orleans Conditions and the necessity for working out the details in bargaining with labor preclude the spectre of repeated moves which appellants raise and reduce the matter to the point that Erie-Lackawanna is willing to pay for any additional moves as hereinafter stated.\*

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\*It would seem apparent that bumping and moves will be more frequent if changes are made piecemeal and by chance as attrition sporadically provides an opening, now here and now there, for individual employees, than if consolidation is effected on a group basis pursuant to a rational plan under the New Orleans Conditions.

(2) Similarly, the New Orleans Conditions do not cause loss of accumulated annuity rights under the Railroad Retirement Act. Erie-Lackawanna has heretofore been advised by the Railroad Retirement Board that, in accordance with General Counsel's Opinion L. 54-308 New Orleans Terminal Case, compensation under the New Orleans Conditions is subject to contribution for railroad retirement purposes. Thus, an employee who is furloughed and draws benefits under the New Orleans Conditions is in the same position as a man in active employment status so far as railroad retirement benefits are concerned. The fears expressed by appellants as to the loss of annuity rights under the Railroad Retirement Act arise, not from the New Orleans Conditions, but from the fact that the protective period under the second sentence of § 5(2)(f) is a maximum of four years, while the period required for full coverage under the Railroad Retirement Act is ten years. Thus, if an employee has less than six years' service when he is laid off because of the merger, and he is thereafter protected for four years by compensation under the New Orleans Conditions, he would not have the total of ten years required for full coverage under the Railroad Retirement Act. But this would likewise be true with respect to the same employee if he should be protected by a job freeze for the four year period and then discharged. In neither case would he achieve ten years for Railroad Retirement Act purposes. That does not mean that his annuity rights are lost, for his account is then transferred to the social security system.

No system of compensatory conditions can protect against possible permanent loss of employment in the railroad field, nor can a four-year job freeze. Only a permanent job freeze can do that. However, if attrition works as well as appellants suggest that it will, the possibility of permanent loss which appellants fear will not arise.

There remains for consideration appellants' complaint that the New Orleans Conditions are deficient in that they compensate only for the first move required by the merger and do not provide compensation for any subsequent moves. The one move limitation is consistent with the language of the Washington Agreement, which provides in paragraph 11(b) (R. 149):

"Changes in place of residence subsequent to the initial change caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this Section."

It seems clear that the Washington Agreement contemplated that coordinations and consolidations would require *only* one move and that orderly procedure would make it unusual to be shifting employees back and forth. Erie-Lackawanna feels that this aspect of the matter is so *de minimis* that, as hereinafter stated, it will compensate any employee who is required to move more than once, if such an employee can be found.

Appellants do not renew in their brief the claim advanced in their applications to this Court for a stay that the New Orleans Conditions are also deficient with respect to hospitalization benefits. However consistent with the position taken in opposing the stay, Erie-Lackawanna will also make suitable provisions in that regard.

Therefore, in order to eliminate any claim of inadequacy of the New Orleans Conditions, if this Court affirms the order below, Erie-Lackawanna agrees to the entry of an order by the Commission in accordance with the jurisdiction retained by it (R. 32) which shall provide in substance as follows:

(a) If any employee is required to move his place of residence more than once as a result of the merger, Erie-Lackawanna will pay the benefits with respect to any such move, just as in the case of the first move as provided under the New Orleans Conditions; and

(b) In addition to benefits due under Paragraph 6 of the Oklahoma Conditions, incorporated in the New Orleans Conditions (R. 157), Erie-Lackawanna will pay to each employee furloughed by reason of the merger who at that time is covered by company maintained hospital insurance an amount equal to the monthly premium cost to such covered employee\* of maintaining his benefits under the comparable Travelers Insurance Company Policy GA-23111 which has been in operation for some time for the benefit of furloughed employees.

These undertakings by Erie-Lackawanna are made, not in a spirit of bargaining or in any sense of conceding that the New Orleans Conditions as imposed by the Commission are inadequate, but for the purpose of eliminating any possible objection to the adequacy of the New Orleans Conditions. Exact dollar equivalency may never be achieved—for instance, a furloughed employee may be financially better off under the New Orleans Conditions in that he is no longer paying union dues, buying work clothes or incurring transportation costs to and from work—but, as we read the requirements of the second sentence of § 5(2)(f), the compensatory conditions should approximate as closely as possible the value of the employment. There can be no question of that here, in the light of the above undertakings.

\*"Covered employees" are non-operating employees who receive hospitalization insurance. Operating employees elected to receive an increase in pay in lieu thereof and such affected employees would, of course, have that increase reflected in salary payments under the New Orleans Conditions.

**7. The court below did not err in referring to labor publications or in its handling of testimony taken at the hearing on the temporary restraining order.**

Appellants charge that the court below erred in refusing to receive the testimony given by Mr. Crotty (Br. 4, 85-86) at the hearing before Judge Thornton on the temporary restraining order deserves short shrift. Counsel for appellants advised the court below that such testimony added nothing to the merits of his contention as to the meaning of § 5(2)(f) (R. 176). Also, the blunt fact is that the court below did not refuse to accept the testimony but left the matter undecided, and appellants took no exception to that action (R. 176-180).

Likewise specious is appellants' assertion (4, 82-83, 85) that the court below should not have referred to the labor publications listed in footnote 3 of its opinion (R. 201). Those publications were listed and quoted from in the joint brief below of the United States and the Commission as examples of the contemporaneous construction which railway labor put upon § 5(2)(f) in 1940 as requiring only compensatory benefits, and were again presented at the argument. Appellants raised no objection, and indeed, no basis for objection exists. For certainly it is relevant, in arriving at the meaning of a statute, to know what the persons most directly affected by the statute contemporaneously explained that it meant. Judges are not required to decide cases in uninformed isolation, sheltered from the teachings of practical life. As this Court has indicated on many occasions, courts may inform themselves on matters deemed relevant from appropriate sources. See, *e.g.*, *Brown v. Board of Education*, 347 U. S. 483 at 494, n. 11; see also *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470, at 485, n. 7 (dissenting opinion of Mr. Justice Jackson). There is nothing to the contrary in *United States v. United*

*Mine Workers of America*, 330 U. S. 258 at 281-282, which appellants cite for their contention. That case is wholly inapposite, for at the place cited this Court simply stated why the remarks of certain Senators in a debate in 1943 could not serve to change the legislative intent of Congress expressed in 1932 in connection with enactment of the Norris-La Guardia Act.

### CONCLUSION

For the reasons stated, the judgment below should be affirmed and the stay renewed by this Court in its order of February 20, 1961 (R. 211) should be dissolved.

Respectfully submitted,

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March 23, 1961

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## **APPENDIX**

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**APPENDIX A**

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1960

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No. 681

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,  
*et al.*,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA, *et al.*,

*Appellees.*

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AFFIDAVIT OF GARRET C. WHITE

DISTRICT OF COLUMBIA ) SS:

GARRET C. WHITE, being duly sworn, deposes and says:

1. I am the Vice President-Operations of the Erie-Lackawanna Railroad Company (the Erie-Lackawanna) and I have personal knowledge of the facts stated below.

2. Beginning October 13, 1956, the Erie and the Lackawanna effected a coordination of facilities at Hoboken, New Jersey. In this coordination, the New Orleans Conditions

were agreed to by the Railway Labor Executives' Association (RLEA) and imposed by the Interstate Commerce Commission and 273 adversely affected employees drew benefits thereunder for varying periods of time. Four years later, in October 1960, benefits were still being paid to 16 employees adversely affected by this coordination because attrition had not made comparable jobs available. The Hoboken Coordination primarily affected a large proportion of employees in three general classifications—Marine Department, Station Service and Towermen-Operators—and, after four years, attrition had not resulted in comparable jobs for all employees in any of these three categories, for of the 16 employees still drawing benefits in October 1960, 5 were from the Marine Department, 7 from Station Service and 4 were Towermen-Operators.

3. Due to the organization of the railway labor force by crafts, attrition projections covering the entire labor force offer little guidance in planning changes in personnel and estimating how attrition will ease the impact of reductions in and relocations of the labor force. A craft by craft study is preferable. I have just completed a study of how attrition is expected to operate over a four-year period upon one of the many crafts involved in the Erie-Lackawanna merger, namely, line clerks, a category which includes all clerks except general office and traffic department clerks.

4. The Erie-Lackawanna plans to eliminate duplicate and unnecessary facilities in the merger area (which is that area Buffalo and East served before the merger by both the Erie and the Lackawanna) and this plan, based upon actual job studies, will eliminate the need for 128 line clerks, approximately 10% of the line clerks in the merger area; of the 128 positions to be abolished, our plans contemplate the elimination of 32 in the first year in which the Erie-Lacka-

wanna is free to proceed with the merger; 64 in the second year and 32 in the third year.

5. Based upon actual attrition among the line clerks in the merger area for 1959 (which I believe to be the most recent normal year), and assuming that attrition will continue at the same rate, 26 jobs will become available annually in the merger area by virtue of attrition. Attrition among line clerks in the area west of Buffalo cannot be assumed to create openings available to surplus employees in the merger area for the reason that the collective bargaining representatives of the line clerks have clearly indicated that such job openings must first be filled from the seniority rosters in the area west of Buffalo and this preference, plus the state of the seniority rosters west of Buffalo, precludes any expectation that surplus line clerks from the merger area can be absorbed elsewhere.

6. Personal experience with the operation of attrition in the Hoboken Coordination and in other similar situations (such as the Binghamton-Gibson Coordination in 1959) makes it clear that a position opened by attrition is often not filled by an employee whose job has been abolished by a coordination. Such employee often does not have the qualifications for the position opened. Such personal experience further indicates that a position opened by attrition is often not filled by an adversely affected employee who is qualified for such position because the employee does not wish to move for reasons such as age, family ties and responsibilities, or an unwillingness to accept the new responsibility. Accordingly, of the 26 jobs becoming available annually by virtue of attrition a most favorable estimate is that 80%, or 21 jobs, would actually be filled by people affected by the merger. Indeed this is believed to be a high estimate because it assumes that collective bargaining

agreements covering the line clerks will be changed to permit these jobs to be filled by people from different seniority rosters within the merger area although the fact is that, at present, representatives of the line clerks have stated that they will not agree to such mobility throughout that area, but will only agree to mobility within seniority divisions planned for the merger area.

7. Assuming that 21 affected employees can and will fill jobs opened by attrition, we would have the following results if it were determined that an employment freeze is required:

	<u>1st year</u>	<u>2nd year</u>	<u>3rd year</u>	<u>4th year</u>
Number of jobs abolished .....	32	64	32	0
Number of employees absorbed by attrition	21	21	21	21
Surplus employees (Cumulative total for each year) .....	11	54	65	44

8. While the foregoing table is an estimate, it is believed realistic and supported by experience. Further the assumptions used were most favorable to RLEA's position; for example, it is assumed in that table that the Erie-Lackawanna labor force will remain stable in total numbers, whereas the trend for the past five years has been sharply downward.

9. Both management and labor have a mutual interest in having attrition operate so that men may maintain their employment and perform needed services for their pay rather than receive equal compensation when no work is available, but my best information provides no basis for the

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assumption that attrition will be more than a partial solution over the four-year period involved.

/s/ GARRET C. WHITE  
Garret C. White

Subscribed and sworn to before me this 22nd day of March, 1961.

/s/ LOUISE NORRIS  
Notary Public, D. C.

[SEAL]

My Commission Expires Dec. 14, 1965.